A

Samling Resources Sdn Bhd v Ekovest Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22C-7–01 OF 2020
ALIZA SULAIMAN J
11 JANUARY 2021

C *Arbitration — Stay of proceedings — Conditions — Two defendants sued by plaintiff applied separately for suit to be stayed pending disposal of arbitration proceedings between one of the defendants and plaintiff — Whether granting of stay to defendant which had arbitration agreement with plaintiff was mandatory under s 10(1) of Arbitration Act 2005 — Whether appropriate to grant the stay subject to condition that the arbitration be proceeded with only after plaintiff's* D *claim against the other defendant had been determined first — Whether condition was necessary to prevent arbitration tribunal and court from reaching different conclusions with regard to role and/or liability of defendant which had no arbitration agreement with plaintiff — Whether court's determination of that defendant's liability or otherwise would bind the arbitration tribunal but the* E *reverse was not the case if the arbitration was concluded first — Whether stay application of defendant which had no arbitration agreement with plaintiff had to be dismissed as it failed to show any special rare or compelling reason for the stay to be granted*

F The defendants herein applied for the proceedings in the instant suit to be stayed pending the disposal of arbitration between the second defendant ('D2') and the plaintiff. The arbitration was based on an arbitration agreement contained in a joint-venture agreement ('JVA') between the plaintiff and D2. The first defendant ('D1') was not a party to the JVA and had no arbitration G agreement with the plaintiff. While D2 relied upon s 10(1) of the Arbitration Act 2005 to apply for the stay, D1 merely appealed to the court's inherent jurisdiction to grant the stay. In the suit, the plaintiff sought general damages from the defendants for, inter alia, breaching certain representations and assurances they had allegedly made to cause it to enter into the JVA with D2 to H carry out a project. The plaintiff also alleged that the defendants had breached fiduciary duties they owed the plaintiff and that D2 had breached certain terms of the JVA. The plaintiff argued that since its case against the two defendants involved substantially the same issues and the same witnesses, the trial against D1 and the arbitration proceedings involving only D2 should not be allowed to I proceed at the same time as there was a real risk that the arbitral tribunal and the court might come to different conclusions with regard to D1's role in the transactions between the parties and thereby prejudice the plaintiff. Accordingly, the plaintiff submitted, the court in allowing D2's stay application should subject it to the condition that the plaintiff's claim against

D1 in the instant suit be determined first before D2's arbitration was proceeded with.

Held, dismissing D1's application; allowing D2's stay application subject to the condition that the plaintiff's claim against D1 in the instant suit be resolved first before the arbitration proceedings was proceeded with:

(1) Clause 15 of the JVA constituted a binding arbitration agreement between the plaintiff and D2 and in the absence of evidence that the agreement was null and void, inoperative or incapable of being performed s 10(1) of the AA made it mandatory that the stay application was granted. However, pursuant to s 10(2) of the AA, the stay was subjected to the condition that the arbitration between the plaintiff and D2 proceed only after the plaintiff had resolved its claim against D1 in the instant suit (see paras 34–35).

(2) Given the substantial disputes between the parties regarding many crucial aspects of the case and the fact that the principal witnesses for both sides were highly likely to be the same persons, by allowing the claim against D1 to be disposed of first would neutralise the risk of inconsistent findings by the two separate forums with regard to D1's role in the project. The trial court's findings in respect of D1 would bind the arbitration tribunal. But the tribunal's findings would not bind the court which might come to a different conclusion after hearing all the evidence. There was also the likelihood that if the arbitration was concluded first, D1 might challenge its findings in respect of its role in the project and that might give rise to a re-litigation of matters already determined by the arbitral tribunal and lead to duplicity in terms of evidence and resources. The findings of fact by the court with regard to D1's involvement in the project and its liability, if any, would 'set the scene' in facilitating the determination of D2's liability, if any, and the joint and several liability of both the defendants, if any, in respect of the project (see para 49).

(3) D1 failed to establish that there were special or rare and compelling circumstances that warranted a stay of the suit against itself. D1 could not rely on cll 15 and 18.4 of the JVA as those clauses did not apply to it since it was not a party to the JVA (see paras 59–60).

[Bahasa Malaysia summary

Defendan-defenden memohon agar prosiding dalam saman semasa digantung sementara menunggu pelupusan timbang tara antara defendan kedua ('D2') dan plaintif. Timbang tara tersebut adalah berdasarkan persetujuan timbang tara yang terkandung dalam perjanjian usaha sama ('PUS') antara plaintif dan D2. Defendan pertama ('D1') bukan pihak dalam JVA dan tidak mempunyai persetujuan timbang tara dengan plaintif. Meskipun D2 bergantung kepada s 10(1) Akta Timbang Tara 2005 ('ATT') untuk memohon penggantungan,

D1 hanya merayu kepada bidang kuasa sedia ada mahkamah untuk membenarkan penggantungan tersebut. Dalam tindakan tersebut, plaintif menuntut ganti rugi am daripada defendan kerana, antara lain, melanggar representasi dan jaminan tertentu yang didakwa dibuat mereka untuk menyebabkan ia memasuki PUS dengan D2 untuk menjalankan projek. Plaintif juga mendakwa bahawa defendan telah melanggar kewajipan fidusiari mereka dengan plaintif dan bahawa D2 telah melanggar syarat tertentu PUS. Plaintif berpendapat bahawa memandangkan kesnya terhadap kedua-dua defendan melibatkan sebahagian besar isu yang sama dan saksi yang sama, perbicaraan terhadap D1 dan prosiding timbang tara yang melibatkan hanya D2 tidak seharusnya dibenarkan untuk diteruskan pada masa yang sama kerana terdapat risiko sebenar bahawa tribunal timbang tara dan mahkamah mungkin membuat kesimpulan yang berbeza berkenaan dengan peranan D1 dalam transaksi antara pihak-pihak dan dengan itu memprejudiskan plaintif. Sehubungan itu, plaintif berhujah, mahkamah dalam membenarkan permohonan penggantungan D2 hendaklah tertakluk kepada syarat bahawa tuntutan plaintif terhadap D1 dalam saman semasa ditentukan terlebih dahulu sebelum timbang tara D2 diteruskan.

Diputuskan, menolak permohonan D1; membenarkan permohonan penggantungan D2 tertakluk kepada syarat bahawa tuntutan plaintif terhadap D1 dalam saman semasa dilupuskan terlebih dahulu sebelum prosiding timbang tara diteruskan:

(1) Klausa 15 JVA membentuk perjanjian timbang tara yang mengikat antara plaintif dan D2 dan jika tiada keterangan bahawa perjanjian tersebut batal dan tidak sah, tidak berkuat kuasa atau tidak mampu dilaksanakan s 10(1) AT mewajibkan bahawa permohonan penggantungan dibenarkan. Walau bagaimanapun, menurut s 10(2) AT, penggantungan tersebut tertakluk kepada syarat bahawa timbang tara antara plaintif dan D2 diteruskan hanya selepas plaintif melupuskan tuntutannya terhadap D1 dalam saman semasa (lihat perenggan 34–35).

(2) Memandangkan pertikaian yang ketara antara pihak-pihak berkenaan banyak aspek penting kes dan fakta bahawa saksi utama bagi kedua-dua pihak berkemungkinan besar adalah orang yang sama, dengan membenarkan tuntutan terhadap D1 dilupuskan terlebih dahulu akan meneutralkan risiko dapatan tidak konsisten oleh dua forum berasingan berkenaan dengan peranan D1 dalam projek tersebut. Dapatan mahkamah perbicaraan berkenaan dengan D1 akan mengikat tribunal timbang tara. Tetapi dapatan tribunal tidak akan mengikat mahkamah yang mungkin membuat kesimpulan berbeza selepas mendengar semua keterangan. Terdapat juga kemungkinan bahawa sekiranya timbang tara dimuktamadkan dahulu, D1 mungkin mencabar dapatannnya berkenaan dengan peranannya dalam projek dan yang mungkin menimbulkan litigasi semula perkara yang telah ditentukan oleh tribunal

timbang tara dan membawa kepada perduaan dari segi terma keterangan dan sumber. Dapatan fakta oleh mahkamah berkenaan dengan penglibatan D1 dalam projek dan liabilitinya, jika ada, akan 'memberikan pembuktian' dalam memudahkan penentuan liabiliti D2, jika ada, dan liabiliti bersama dan berasingan kedua-dua defendan, jika ada, berkenaan dengan projek tersebut (lihat perenggan 49).

(3) D1 gagal untuk membuktikan bahawa terdapat keadaan istimewa atau jarang berlaku dan memaksa yang memerlukan penggantungan tindakan terhadapnya. D1 tidak boleh bergantung pada klausa 15 dan 18.4 PUS kerana klausa tersebut tidak terpakai kepadanya kerana ia bukanlah pihak kepada PUS (lihat perenggan 59–60).]

Cases referred to

Apex Marble Sdn Bhd & Anor v Leong Tat Yan [2018] MLJU 39, HC (refd)
BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore [2010] 5 MLJ 778; [2010] 8 CLJ 920, CA (refd)
Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action [2012] 9 MLJ 510; [2012] 1 LNS 166, HC (refd)
Busuk Jamilah bte Salim & Ors v Siti Rahfizah binti Mihaldin & Anor [2009] MLJU 1346; [2009] 1 LNS 1358, HC (refd)
Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd & Ors and other appeals [2015] 1 MLJ 507; [2014] 1 LNS 1175, CA (refd)
FAMG Idaman Resources v Jasmadu Sdn Bhd [2020] 7 MLJ 263, HC (refd)
Gadang Engineering (M) Sdn Bhd v Bluwater Developments Bhd [2010] MLJU 2213, HC (refd)
Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia [2017] 7 MLJ 274, HC (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2012] MLJU 839; [2013] 1 CLJ 993, HC (refd)
Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn Bhd & Anor [2011] 5 CLJ 40, CA (refd)
Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11; [2002] 4 CLJ 729, HC (refd)
Malaysia Offshore Mobile Production v PCPP Operating Company Sdn Bhd & Ors [2019] MLJU 1587; [2019] 1 LNS 1880, HC (distd)
Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] MLJU 1860; [2014] 3 CLJ 915, HC (refd)
Nortel Networks (Asia) Ltd (formerly known as Northern Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors [2012] 6 MLJ 491; [2012] 8 CLJ 296, CA (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Protasco Bhd v Tey Por Yee and another appeal [2018] MLJU 993; [2018] 5 CLJ 299, CA (refd)
Reichhold Norway ASA and another v Goldman Sachs International (a firm) [2000] 1 WLR 173, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (distd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)
Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk Industries Bhd [2004] 2 MLJ 230; [2004] 5 CLJ 493, HC (refd)
TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857; [2013] 1 LNS 288, CA (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)
Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal [2020] 3 MLJ 545; [2020] 4 CLJ 301, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57, CA (refd)
ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
Arbitration Act 2005 ss 8, 10, 10(1), (2)
Limitation Act 1953 s 6(1)
Rules of Court 2012 O 18 r 19(1), O 92 r 4

Lam Ko Luen (Nina Lai Jian Xian and Ong Kun Sen with him) (Shook Lin & Bok) for the plaintiff.
R Jayasingam (Daniel Ng Keng Yang with him) (BH Lawrence & Co) for the defendants.

Aliza Sulaiman J:

INTRODUCTION

[1] There were two applications before this court, namely:

(a) the application by the first defendant ('D1') vide encl 8 pursuant to O 92 r 4 of the Rules of Court 2012 ('the RoC 2012') or any applicable legal provision and/or the inherent jurisdiction of the court for a temporary stay of further proceedings in relation to the plaintiff's suit against D1 pending disposal of the arbitration proceeding between the plaintiff and the second defendant ('D2') which was commenced by D2 ('D2

Arbitration') in reliance of cl 15 of the joint venture and shareholders' agreement dated 6 January 2017 ('JVA'); and

(b) the application by D2 vide encl 7 pursuant to s 10 of the Arbitration Act 2005 ('the AA 2005') or any applicable legal provision and/or the inherent jurisdiction of the court for a stay of further proceedings in relation to the plaintiff's suit against D2 and that it be referred to arbitration.

[2] After consideration of the cause papers and written submissions filed by the parties as well as the oral submissions which were ably delivered by lead counsels for the plaintiff, Mr Lam Ko Luen and for D1 and D2, Mr R Jayasingam, this court made the following orders:

(a) that D2's application is allowed subject to the condition as proposed by the plaintiff namely, the D2 Arbitration shall proceed only after the resolution of the plaintiff's claim against D1 in the present suit ('said condition');

(b) D1's application is dismissed; and

(c) costs in the cause for both encls 7 and 8.

[3] Aggrieved by the afore mentioned orders of the court, D1 and D2 are pursuing an appeal against the same. These are my full grounds for the decision.

SALIENT FACTS

[4] According to the statement of claim ('SoC'), the plaintiff carries on the business of construction of logging and/or rural roads and bridges and camp infrastructure. Its registered and business addresses are in Miri and Kuching, Sarawak, respectively.

[5] D1 and D2 needs no introduction as they are part of the well-known Ekovest Group of Companies that carry on the principal business of civil engineering and building construction, with extensive experience in the construction of highways and road works. One of the notable projects carried out by D1 is the Duta-Ulu Klang Expressway ('DUKE') in the Klang Valley. D2 is a wholly owned subsidiary of D1.

[6] Vide a letter of award ('LoA') for 'Works Package Contract — WPC-02 (Sematan to Sg Moyan Bridge + KSR Interchanges)' dated 25 July 2016 ('project'), Lebuhraya Borneo Utara Sdn Bhd ('LBU') awarded the said works package in the sum of more than RM2 billion to the plaintiff.

A **[7]** On 25 January 2017, the contract agreement and the conditions of contract that form part of the contract documents between LBU and the plaintiff were executed.

[8] Prior to the LoA, the plaintiff and D1 engaged in discussions on the B possibility of D1 supporting the plaintiff as technical advisor or technical support if the plaintiff was to be awarded the project. Subsequently, D1 decided to explore the possibility of procuring a complete subcontract of the project from the plaintiff. D2 was identified and designated by D1 for this purpose.

C

[9] The plaintiff alleged that Tan Sri Datuk Lim Keng Cheng ('Tan Sri KC Lim'), who was the managing director of D1 and D2 at the material time, represented D1 in the said discussions.

D

[10] However, the tenders submitted by D2 were not accepted by the plaintiff. Around October 2016, the plaintiff, D1 and D2 then discussed the possibility of entering a joint venture relationship to implement the project.

E **[11]** It is the plaintiff's case that the mutual understanding between the parties was that D1 and D2 would 'drive' the project by among others, assisting and advising the plaintiff in the implementation of the project; assessing and recommending suitable subcontractors; and overseeing overall execution of the project since D1 and D2 have the requisite experience and expertise in the F construction of highways.

[12] The plaintiff also contended that in the course of the negotiations, D1 and/or D2 had represented to, and/or assured, the plaintiff that a gross profit margin of 20% to 25% ('profit margin') of the awarded contract by LBU to the G plaintiff in the sum of RM2,112,800,000, or any revised contract sum minus the prime cost and provisional sums, would be achieved with the participation of D2.

[13] The representations and/or assurances with regards to the technical H advice and support and the project margin are collectively referred to in the SoC as the 'Representations and/or Assurances' ('representations and/or assurances').

[14] The discussions and negotiations culminated in the signing of the JVA I between the plaintiff and D2 on 6 January 2017. The JVA provides, inter alia, for the incorporation of a joint venture company named Samling-Ekovest JV Sdn Bhd ('SEJV') with a 70% (plaintiff): 30% (D2) shareholding structure. The principal business objective and purpose of SEJV shall be to pursue and undertake the project (cl 3.1) and immediately upon the incorporation of

SEJV, the plaintiff shall cause and procure any subcontracts it may have awarded to any subcontractors in respect of the project to be assigned or novated to SEJV (cl 3.6).

[15] It is additionally a term of the JVA that, immediately upon the incorporation of SEJV, the plaintiff shall subcontract the project in its entirety on a back-to-back basis to SEJV at the same price at which the project was awarded to the plaintiff as per the LoA, and with the approval of LBU, if required, in order that SEJV may carry out the project as per the agreement of the parties in the JVA (cl 3.7).

[16] By a letter dated 6 January 2017 issued by D2 to the plaintiff, the parties entered into a collateral agreement to use their 'best endeavours' to achieve the profit margin ('collateral agreement').

[17] Thereafter, D1 and D2 purportedly recommended several subcontractors to the plaintiff who were then appointed to carry out the works under the project.

[18] The plaintiff claimed that it was subsequently discovered that the subcontractors recommended by D1 and/or D2 were not suitable to carry out the works under the project and the subcontractors had failed, neglected and/or omitted to perform their obligations under their respective subcontracts.

[19] On 15 May 2018, LBU communicated to the plaintiff regarding its non-approval of the subcontracting of the project to SEJV. D2 was informed of this fact on 31 May 2018.

[20] Thereafter, the plaintiff had to take over the works from SEJV and incurred additional costs in appointing new subcontractors to continue with, and to complete, the subcontract works initially awarded to the subcontractors recommended by D1 and/or D2.

[21] The plaintiff filed the present action against D1 and D2 premised on, among others, the following:

(a) negligent misrepresentations and/or misstatements in respect of the representations and/or assurances;

(b) that D1 and/or D2 failed, neglected and/or omitted to discharge their responsibilities with due care and diligence in furtherance of the representations and/or assurances, in the implementation and execution of the project;

(c) alternatively or in addition to the above, D1 and/or D2 acted in breach of their fiduciary duties owed to the plaintiff, including, inter alia, the duties under common law and equity;

(d) that D2 was in breach of the JVA when it failed, neglected and/or omitted to discharge its responsibilities which were within the areas of its expertise;

(e) D2 was in breach of the collateral agreement when it failed, neglected and/or omitted to use its 'best endeavours' to achieve the profit margin; and

(f) that there are breaches and misrepresentations by D1 and/or D2 in respect of the subcontractors that were selected, recommended and appointed to carry out the subcontract works under the project, namely Greenland Knusford Construction Sdn Bhd, North Big Builders Sdn Bhd — Laksamana Builders Sdn Bhd, MGB Geotech Sdn Bhd, Musyati Sdn Bhd and Hubro Sdn Bhd.

[22] The plaintiff pleaded that as a result of all or any of the abovementioned, the plaintiff has suffered and continues to suffer loss and damage.

[23] The reliefs sought by the plaintiff against D1 and/or D2 jointly and severally are for general damages, interest and costs.

[24] Meanwhile, on 3 July 2018, D2 commenced the D2 Arbitration against the plaintiff by serving a notice of arbitration dated 3 July 2018 pursuant to the arbitration agreement in cl 15 of the JVA.

[25] Based on D2's amended statement of case re-dated 28 February 2020 in the D2 arbitration, it was contended, inter alia, that:

(a) the plaintiff sought the support of D2 as technical advisor in the tender process and in consideration, agreed to appoint D1 and/or D2 as subcontractor for the contract value/scope equivalent to 30% of the total subcontract packages for the project works;

(b) the plaintiff was only able to secure the LoA due to D2's involvement;

(c) LBU was well aware of the relationship between D2 and the plaintiff and the role played by D2 in the tender and the project;

(d) on or around 23 November 2017, the plaintiff began taking steps in breach of the understanding and agreement between D2 and the plaintiff by awarding a portion of the subcontract works directly to Musyati Sdn Bhd without the authorisation or knowledge of SEJV;

(e) on 4 January 2018, the plaintiff submitted a draft agreement to D2 proposing a mutual termination of the JVA which was rejected by D2;

(f) on 31 May 2018, the plaintiff notified D2 that the JVA is void by virtue of a purported refusal by LBU to consent to the plaintiff subcontracting the project to SEJV;

(g) the plaintiff made the following representations and statements:

(i) 'That the execution and delivery and performance of the Agreement was within the parties' powers and had been duly authorised by all necessary corporate action and will not be in contravention of its M&A and will not violate any law or regulation or any judgment, order or decree of any governmental authority or any contract or undertaking binding on or affecting';

(ii) 'That it would exercise all of its powers of control available to it to give full effect to the terms and conditions of the JV Agreement';

(iii) 'To procure all third parties directly or indirectly under its control to refrain from acting in a manner which will hinder or prevent the JV Company from carrying on its business in a proper and reasonable manner'; and

(iv) 'That the Respondent SHALL sub-contract the project in its entirety on a back to back basis to the JV Company with the approval of LBUSB if required'.

(h) the plaintiff had breached the JVA by, among others, wrongfully terminating the same and/or wrongfully declaring that the JVA is void or in the alternative, that the plaintiff made fraudulent, negligent and/or innocent misrepresentation.

[26] D2 prayed for general damages for the repudiation of the JVA and/or misrepresentation to be assessed, interest and costs.

[27] The stage of proceedings of the arbitration thus far is as follows:

(a) the first preliminary meeting was held on 18 April 2019 and the learned arbitrator gave the Procedural Order No 1;

(b) a telephone conference was held on 10 January 2020;

(c) the learned arbitrator gave Procedural Order No 2 dated 5 February 2020;

(d) apart from D2's amended statement of case re-dated 28 February 2020, the plaintiff's amended defence re-dated 4 October 2019 and the reply to the amended defence dated 7 November 2019 have been submitted;

(e) at the date of the hearing of the instant applications before this court on 13 July 2020, the parties were in the midst of exchanging the documents; and

(f) the hearing dates on the issue of liability have been fixed from 29 September 2020 to 2 October 2020.

THE LEGAL PRINCIPLES

[28] The statutory provisions which were expressly relied upon in D1's application vide encl 8 is O 92 r 4 of the RoC 2012 which provides the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[29] As regards D2's application vide encl 7, the provision cited is s 10 of the AA 2005 where for present purposes, the relevant parts read as follows:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
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> ...
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> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.
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> ...

[30] Clause 15 of the JVA reads as follows:

> 15. *ARBITRATION*
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> (a) All disputes, controversy or differences arising out of or in connection with this Agreement shall be settled by arbitration, in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration. The seat of the Arbitration shall be Malaysia.
>
> (b) The place of arbitration shall be Kuala Lumpur, Malaysia.
>
> (c) The dispute, controversy or difference shall be referred to an Arbitrator to be mutually agreed upon by the Parties, or failing which the arbitrator shall be appointed by the Director the Kuala Lumpur Regional Centre for Arbitration, on the application of any of the Parties.
>
> (d) In rendering their decision, the arbitrator shall apply Malaysian law as the law of the contract.

(e) The language to be used in the arbitration proceedings shall be the English Language.

(f) The award thereof shall be final and binding upon the Parties.

(g) During the course of arbitration, this Agreement and the Project shall, continue to be performed in all respects except for the disputed part under arbitration.

[31] In *Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia* [2017] 7 MLJ 274, the High Court in para 27 at p 283 said that:

> In the light of the new regime introduced by the UNCITRAL Model Law and which principles are incorporated into the Arbitration Act 2005, parties should be given every encouragement and facility to go for arbitration as they have agreed in the arbitration agreement and absent a clear intention to abandon that altogether, the court should hold the parties to their bargain in keeping with the parties' expressed intention.

[32] The plaintiff and D2 do not dispute that the above quoted cl 15 constitutes an agreement between them to settle all disputes, controversy or differences arising out of, or in connection with, the JVA by arbitration. It is also not disputed that D2 has not, before making the application in encl 7, taken any steps in the court proceedings. Since the requirements as expressly provided under sub-s 10(1) of the AA 2005 are fulfilled, the court will thus grant the stay unless there is evidence to prove, on balance of probabilities, that the agreement to arbitrate is null and void, inoperative or incapable of being performed (see the decision of the Court of Appeal in *Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn Bhd & Anor* [2011] 5 CLJ 40 and the High Court case of *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633).

[33] In *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1, the question of law to be determined by the Federal Court was whether a court may grant a stay of all proceedings under sub-s 10(1) of the AA 2005 where only part of the matter in issue falls strictly within the ambit of the arbitration clause and part does not. In the course of deciding this issue, Ramly Ali FCJ in delivering the judgment of the court held that, in order to grant a stay order under sub-s 10(1) of the AA 2005 after the amendment to the said provision vide s 4 of the Arbitration (Amendment) Act 2011 (Act A1395) which came into operation on 1 July 2011, the court has to consider whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under sub-s 10(1) of the AA 2005. Once the court finds that all the

prerequisites as laid down in the said provision have been fulfilled, a stay is mandatory (see too, the decision of the Court of Appeal in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857; [2013] 1 LNS 288 and the recent Federal Court decision in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545; [2020] 4 CLJ 301).

[34] With this lucid pronouncement by the apex court, it should immediately be made clear that in my opinion, cl 15 of the JVA undoubtedly constitutes a binding arbitration agreement or clause between the plaintiff and D2, and there is no evidence to show that the arbitration agreement is null and void, inoperative or incapable of being performed. In these circumstances, it is a foregone conclusion that D2's application in encl 7 for a stay of further proceedings in relation to the plaintiff's suit against D2 and that it be referred to arbitration must be allowed as sub-s 10(1) of the AA 2005 renders a stay mandatory.

[35] However, this court went on to hold that, pursuant to the powers accorded by sub-s 10(2) of the AA 2005, the stay is subject to the second condition as stated in para 54 of the plaintiff's written submission dated 15 June 2020 (encl 24) namely, the ongoing arbitration proceeding between the plaintiff and D2 shall proceed only after the resolution of the plaintiff's claim against D1 in the present action. For the sake of completeness, the conditions proposed by the plaintiff in the said submission are:

> Either
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> (a) the Plaintiff be entitled to pursue its claim levelled against the second Defendant in this action by way of counterclaim in the D2 Arbitration; and
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> (b) thereafter the D2 Arbitration be stayed and shall only proceed after the resolution of the Plaintiff's claim against the first Defendant in the present action.
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> Or
>
> (a) the D2 Arbitration be stayed and shall only proceed after the resolution of the Plaintiff's claim against the first Defendant in the present action; and
>
> (b) the arbitration to be commenced by the Plaintiff against the second Defendant shall only proceed after the resolution of the Plaintiff's claim against the first Defendant in the present action.

[36] In *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 and 2018)* and the AIAC Arbitration Rules 2018 (Sweet & Maxwell, 2019) by Datuk Professor Sundra Rajoo and Special Contributor Dr Thomas R Klötzel, it was explained at p 199 that 'Section 10(2) is a new provision which gives the court the power to impose conditions on the granting

of the stay. This is not an UNCITRAL Model Law provision' and further expressed the hope that '… the courts will bear in mind the policy of honouring and supporting the arbitration agreement and not to impose conditions which may stifle the arbitral process …'.

[37] Returning to the factual matrix in the instant case, there are two defendants ie D2, which has a valid arbitration agreement with the plaintiff, and D1 which has no such agreement. In the premises, the plaintiff relied heavily on the judgment of the Court of Appeal in *Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299 in moving this court to consider the imposition of condition(s) if the court is minded to allow D2's application for stay under sub-s 10(1) of the AA 2005. The court in *Protasco* discussed the law governing a stay of proceedings in relation to non-parties to an arbitration agreement and whether any condition is to be attached to an order for stay.

[38] The brief facts of the case are that Protasco Bhd ('Protasco') had brought a claim against PT Anglo Slavic Utama ('PT ASU') as the first defendant, Tey Por Yee ('Tey') as the second defendant and Ooi Kock Aun ('Ooi') as the third defendant. Protasco and PT Asu had executed a sale and purchase agreement which contained an arbitration clause. PT ASU obtained a stay of the court proceedings between Protasco and itself vide an order of the court dated 25 February 2016 pursuant to s 10 of the AA 2005. Thereafter, Tey and Ooi filed applications for a stay of the court proceedings on 25 March 2016 pending the disposal of the arbitration proceedings between Protasco and PT ASU. The High Court allowed these applications and thus, the pursuit of the appeal by Protasco to the Court of Appeal.

[39] Nallini Pathmanathan JCA (now FCJ) delivered the judgment of the court where the law in relation to the issue of staying proceedings against non-parties pending arbitration in the United Kingdom, Australia and Singapore was anaylsed. The court found that the options as outlined by the Singapore Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57 afford a logical and well-summarised series of choices available to a court faced with such an issue. The court went on to say (with my added emphasis) that:

> [51] *In deciding on these options, it is necessary to take into consideration and weigh up several competing factors relating to both the arbitration and the court proceedings,* including:
>
> (i) *The overlap in parties in the proceedings and the arbitration* — namely Protasco and PT ASU;
>
> (ii) *The overlap of the issues that will be raised in the arbitration. Here the arbitration has not commenced*. In the absence of any material on this

subject we surmise that the dispute or difference arising between Protasco and PT ASU relates to a conspiracy to defraud/injure, and breach of contract. The former, namely the cause of action premised on conspiracy to defraud or to injure will require ventilation, during the arbitration proceedings, of Tey and Ooi's alleged engineering and implementation of the conspiracy;

(iii) *The cause of action* in breach of contract will also, to a considerable extent, touch on the facts relating to the parts played in this venture by Tey, Ooi and Dato' Chong as well as both parties' agents and/or nominees. *To that extent there is considerable overlap in the factual matrix giving rise to the breach of contract and the conspiracy to injure/defraud*;

(iv) *The principal witnesses for the primary parties in the arbitration* namely Protasco and PT ASU *may be the same actors* ... In order to establish these causes of action, the evidence of these persons will be necessary to establish the basic factual matrix in order to determine whether these causes of action are made out or not;

(v) *The reliefs sought* also bear some similarity save for the quantum claimed ...

[52] On the other hand, any finding of a breach of contract or otherwise does not make Tey and Ooi liable personally. The issue of personal liability if at all, is governed by the court initiated action that comprises the subject matter of these appeals. What this means in practical terms is that *even if the arbitration were to proceed, Protasco will have to continue with the court initiated proceedings once the arbitration is completed, in order to prosecute Tey and Ooi personally. That will require an adjudication of the matter twice*, as it were.

[40] It was further held that no part of Protasco's claim against PT ASU falls to be considered in the civil proceedings, which are stayed pending arbitration ie the claims premised on a breach of contract, allegations of conspiracy and the imposition of a constructive trust. In view of this, the court then weighed the options available in deciding whether a stay of proceedings should be granted to Tey and Ooi in respect of the claims made against them, amongst others, conspiracy to defraud/injure, breach of fiduciary duty and imposition of a constructive trust. These options are expressed in the following passages:

[62] ...

(i) stay the court proceedings only to the extent required under s 10 of the AA, as per the order of this court in relation to PT ASU, but on condition that the proposed arbitration proceed only after the resolution of the remaining court proceedings, ie, resolve that part of the court proceedings which falls outside s 10 first; or

(ii) stay the court proceedings only to the extent required under s 10 of the AA insofar as PT ASU only is concerned, and allow the arbitration and the remaining court proceedings to run in parallel, namely a concurrent resolution of the arbitration involving Protasco and PT ASU, and that part of the court proceedings that fall outside s 10, namely that part of the

suit relating to Protasco versus Tey and Ooi.

[41] The court ultimately found that the former option of staying the arbitration between Protasco and PT ASU until that part of the court proceedings as fall outside of s 10 of the AA 2005 has been determined was the better option and detailed reasons were given for arriving at that conclusion. It was emphasised in para 86 at p 324 that the arbitration is not avoided or nullified in any way; the arbitration agreement is given full effect, only at a later stage. The following remarks at p 321 are additionally noteworthy:

> [74] In determining the best cause of action the following factors fall to be balanced. Of primary concern is the veracity of the evidence of these persons when given in arbitration, and then again in court proceedings, and which might be viewed as abuse, balanced against the right of a party to an action to be afforded a full and proper opportunity to defend serious allegations and causes of action made against him personally and which carry grave consequences. The failure to accord a full opportunity to defend such causes of action might potentially result in a breach of natural justice on the facts of the instant case. The scales, to our minds, come down in favour of avoiding or precluding duplicity of evidence and findings by two separate fora. In other words, staying the arbitration pending the disposal of the non-parties' claims in court appears to provide the most just as well as efficient way of dealing with the particular facts of the instant case.

[42] Apart from *Protasco*, the courts have, in the exercise of the broad discretion under sub-s 10(2) of the AA 2005, imposed conditions where the factual circumstances warrant such imposition. Some examples of the conditions are that the arbitration proceedings be completed within one year failing which the plaintiff will be at liberty to proceed with the summary judgment application (see *Gadang Engineering (M) Sdn Bhd v Bluwater Developments Bhd* [2010] MLJU 2213); that in the arbitration proceedings, the defendant is precluded from raising the defence of limitation under sub-s 6(1) of the Limitation Act 1953 (Act 254) (see, *Apex Marble Sdn Bhd & Anor v Leong Tat Yan* [2018] MLJU 39); and that the court proceedings be stayed and the defendant is to proceed with arbitration within 30 days from the date of the court order (see *FAMG Idaman Resources v Jasmadu Sdn Bhd* [2020] 7 MLJ 263).

[43] With the abovementioned legal principles in mind, I shall now examine the competing contentions by the parties on the issue as to whether this is an apt case for the court to order that condition(s) be imposed on the order for a stay of further proceedings as to the plaintiff's suit against D2.

D2's Application in encl 7: Should condition(s) be imposed on the order for stay of proceedings?

D2's submissions

[44] D2 sought to distinguish *Protasco*'s case on the grounds that:

(a) the SoC in that case reveals that a breach of contract was ancillary to the primary claim of deception, fraud and conspiracy to defraud made against Tey and Ooi and the arbitrator would necessarily have to consider the issues of breach of fiduciary duties on the part of Tey and Ooi in order to determine whether a constructive trust ought to be imposed in PT ASU;

(b) in the present suit, each cause of action against D1 and/or D2 stands on its own and the alleged liability of D1 and/or D2 is not dependent on a finding of liability of either D1 and/or D2; and

(c) the arbitration proceeding in *Protasco* has not commenced as opposed to the instant case where the parties in the D2 Arbitration are at the discovery stage with the hearing scheduled to start on 29 September 2020. The D2 Arbitration should thus be allowed to be completed and the plaintiff can thereafter choose to proceed against D1 if it wishes to do so, subject to the outcome of the arbitration between D2 and the plaintiff.

[45] Mr R Jayasingam further highlighted that s 8 of the AA 2005 expressly states that 'No court shall intervene in matters governed by this Act, except where so provided in this Act' and in line with the decision of the apex court in *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273, this court shall not intervene in the arbitral process unless so provided by the AA 2005.

[46] As regards the conditions proposed by the plaintiff, learned counsel argued that to allow the first condition would tantamount to an abuse of process because the plaintiff could have pursued a counterclaim against D2 in the D2 arbitration ever since early September 2019 when the defence was submitted but it failed to do so. As for the second condition, D2 contends that in essence, it is not dissimilar to the first condition whereby the plaintiff at all material time was at liberty to pursue a counterclaim as aforesaid.

The plaintiff's submissions

[47] At the hearing, the plaintiff had submitted its alternative position in the event that the court is minded to allow D2's application in encl 7. The alternate argument was that the order to allow the plaintiff's claim against D2 to be stayed and be disposed by way of arbitration ought to be subject to the condition that the present action is to proceed and be disposed against D1 before any arbitration proceeding between the plaintiff and D2 is proceeded

with as provided for under sub-s 10(2) of the AA 2005 for the following reasons:

(a) there is a considerable overlap in the factual matrix giving rise to the plaintiff's causes of action against both the defendants and this gives rise to substantially the same issues to be tried. The plaintiff's relief is for damages against both the defendants jointly and severally. To reinforce this point, learned counsel had included a comparative table to show some of the facts pleaded in the SoC, D1's defence and the plaintiff's reply to the said defence (refer APPENDIX A in the written submission);

(b) the plaintiff's claim against D1 before this court and against D2 before the arbitral tribunal cannot be allowed to proceed in tandem as there is a real risk that the two forums may make opposite findings, which may prejudice the plaintiff;

(c) based on the decision in *Protasco*, the Court of Appeal held that an order staying the arbitration proceedings pending the disposal of the court proceedings which related to matters outside the arbitration agreement was the preferred option; and

(d) the conditions as proposed by the plaintiff are warranted in order to ensure that the interests of justice prevail.

Determination by the court

[48] The Court of Appeal in *Protasco*'s case had observed at p 322 that:

> ... each case will differ in terms of the factors to be considered and the weight to be accorded to these matters. It is not in every case that court proceedings of the non-parties should proceed first. In point of fact, court proceedings are often stayed vis a vis non-parties to enable the arbitration to proceed first, particularly where there is one plaintiff who has specifically contracted to arbitrate with one of the defendants. The factors weighing against such a cause of action in the instant case, as outlined above is the potential waste of resources and the duplicity of evidence, and possibly conflicting findings by each of the fora ...

[49] After giving careful consideration to the averments in the affidavits, the evidence and respective submissions by the parties in this case, the court is of the view that:

(a) there will evidently be a substantial dispute between the parties at the trial as to the facts of the case, in particular:

(i) on the intended arrangement with regards to the respective roles to be played by each of them in the project;

(ii) whether there exists an element of negligence in respect of the

representations and/or assurances made to the plaintiff prior to the execution of the JVA and whether they were made by D1 and/or D2;

(iii) whether there exists an element of negligence with regards to the representations made on the subcontractors to be appointed and whether they were made by D1 and/or D2; and

(iv) whether there are any duties owed to the plaintiff by D1 and/or D2 and there has been a breach of those duties by either or both of them in the implementation and execution of the project.

(b) in the D2 Arbitration, the arbitral tribunal is bound to decide on the plaintiff's pleaded case whereby the initial discussions between the plaintiff and D1, and D1's subsequent intended involvement in the project was pleaded in para 12 of the amended defence. Specifically in subpara 12(d), the plaintiff stated that '... sometime on or around October 2016, pursuant to a discussion between the Respondent and Ekovest Berhad and/or the Claimant, the parties embarked upon a discussion to enter into a joint venture relationship to implement the Project. In this regard, the Claimant was identified and designated to be the company that would enter into the formal joint venture agreement with the Respondent. The parties recognized and acknowledged that Ekovest Berhad was the reason why the Respondent had agreed to enter into the joint venture relationship ...'. The arbitral tribunal in the D2 Arbitration would therefore be bound to make findings of fact with regards to D1's intended involvement in the Project even though D1 is not a party in the D2 Arbitration. Such findings of fact would not be binding on D1. However, by allowing the present suit to proceed against D1, this will neutralise the risk of inconsistent finding by separate forums as regards D1's role in the Project;

(c) if the present action is only allowed to proceed after the disposal of the D2 Arbitration, D1 may then seek to challenge the findings and conclusions of the D2 Arbitration tribunal in respect of its involvement in the project as it is not a party to the arbitration proceedings. Even if D1's representative(s) is, or are, called as witnesses in the arbitration hearing, D1 could still argue that it was not accorded a full opportunity to defend itself. If this was to occur, D1's attempts of rehashing the issue of its involvement in the project after the D2 Arbitration has concluded would be tantamount to a re-litigation of matters which have already been determined by the arbitral tribunal. Such course of action would amount to duplicity in terms of evidence as well as resources;

(d) this court is not bound to accept the findings of fact that will be made in the D2 Arbitration. There is the likelihood that this court may, upon hearing all the evidence, arrive at a different finding from the D2 Arbitration tribunal. This outcome can be avoided by proceeding with

the present suit against D1 until its final determination before the D2 Arbitration resumes its proceedings. The findings by the court as against D1 would be binding on the D2 Arbitration tribunal, and hence again, effectively neutralising the risk of inconsistent findings by separate forums. This option would not, to borrow the words from *Protasco*'s case, 'interfere with nor impinge upon' the D2 Arbitration as those proceedings and the arbitration agreement between the plaintiff and D2 under the JVA would be 'given full effect, only at a later stage';

(e) the findings of fact by the court with regards to D1's involvement in the project and its liability, if any, would 'set the scene' in facilitating the determination of D2's liability and the joint and several liability of both defendants in respect of the subsequent implementation of the project. D1's pre-JVA conduct is central to the issue of the intended roles to be played by the plaintiff, D1 and D2 in the implementation of the project. Further, as submitted by the plaintiff, it is not practical for the plaintiff to include a counterclaim against D2 in the D2 Arbitration based on the plaintiff's claim in the present action without the inclusion of D1;

(f) the principal witnesses for the plaintiff and the defendants, be it in the present action and/or the D2 Arbitration, are highly likely to be the same persons. One particular witness who stands out is Tan Sri KC Lim since he features prominently in the pleadings in the instant suit and in the D2 Arbitration. Tan Sri KC Lim allegedly represented D1 and D2 in the discussions with the plaintiff in respect of D1's intended involvement in the project;

(g) D2's reliance on the case of *Malaysia Offshore Mobile Production v PCPP Operating Company Sdn Bhd & Ors* [2019] MLJU 1587; [2019] 1 LNS 1880 is misplaced. In that case, the plaintiff had made an alternative submission that the court ought to impose certain terms and conditions should a stay of the court proceedings be granted. However, the court held that in seeking for such conditions to be imposed, the plaintiff was inviting the court to re-write the agreement that has been covenanted between the parties. The contract for the leasing, operation and maintenance of two plain mobile offshore production unit facilities had an express prohibition against the plaintiff imposing liability or commencing any proceedings against any of the first defendant's shareholders and was clear in its terms that it is solely the first defendant who is to pay any debt due to the plaintiff and not the shareholders. The High Court had rejected the conditions proposed '... as they cannot be said to render any support and give effect to the parties' intention'. In contrast, there is no such prohibition clause in the JVA limiting and/or excluding the liability of D1, and the plaintiff is very much entitled to pursue the present action against D1. The issue of this court re-writing

A the terms of the JVA if encl 7 is allowed with conditions simply does not arise; and

(h) D2's submission that the plaintiff's only remedy is against D2 by virtue of cl 18.4 in the JVA on 'Entire agreement' which reads 'The provisions herein constitute the entire agreement between the Parties hereto and supersede all previous expectations, understandings, communications, representation and agreements whether verbal or written between them with respect to the subject matter hereof', is misconceived. This clause cannot be applied to D1 as it is not a party to the JVA. Hence, it is nonsensical to contend that the plaintiff is prevented from exercising its right to pursue a claim against D1 premised on, among others, the representations and/or assurances on the basis of this clause. In any event, cl 18.4 of the JVA may be relevant as D2's defence in the civil suit but the same cannot be said for purposes of the application in encl 7.

[50] In the upshot, this court is persuaded by the plaintiff's arguments that the path of least resistance is to order the stay of proceedings against D2 to be subject to the said condition as proposed by the plaintiff ie for the present action against D1 to proceed and be disposed of first before the D2 Arbitration is allowed to proceed.

D1's application in encl 8

[51] D1 placed similar reliance on the entire agreement clause in the JVA for purposes of this application. However, despite the array of cases cited by D1 to support its submission namely, *Nortel Networks (Asia) Ltd (formerly known as Northern Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors* [2012] 6 MLJ 491; [2012] 8 CLJ 296; *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337; *BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore* [2010] 5 MLJ 778; [2010] 8 CLJ 920; *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11; [2002] 4 CLJ 729; and *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action* [2012] 9 MLJ 510; [2012] 1 LNS 166, this court remains unconvinced that cl 18.4 of the JVA can be applied against D1 in the manner as posited by D1's counsel. The main hurdle for this argument to be successful is the fact that D1 is not a party and a signatory to the JVA.

[52] I shall now deal with D1's other points of submission.

D1's submissions

[53] Learned counsel pointed out that D1 does not object to the continuing of the D2 Arbitration. If D1's application to stay the suit is allowed, it was submitted that matters such as overlapping of issues, the risk of inconsistent findings between two tribunals and duplicity of costs as arose in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 would be a non-issue.

[54] It was further contended that cl 15 of the JVA is wide enough to encompass the plaintiff's claim including the claim of negligent misrepresentation and/or misstatement made by D1 and/or D2. Apart from the case authorities of *Busuk Jamilah bte Salim & Ors v Siti Rahfizah binti Mihaldin & Anor* [2009] MLJU 1346; [2009] 1 LNS 1358; *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1; *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2012] MLJU 839; [2013] 1 CLJ 993; and *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545; [2020] 4 CLJ 301, D1's counsel also cited the decision in *Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk Industries Bhd* [2004] 2 MLJ 230; [2004] 5 CLJ 493 where allegations of fraud were hurled against the defendant. Mr R Jayasingam argued that although an allegation of fraud is more complicated than an allegation of misrepresentation, the High Court allowed the defendant's application for a stay of court proceedings pending reference to arbitration regarding the validity of a production agreement between the plaintiff and the defendant under s 6 of the Arbitration Act 1952 (Act 93).

[55] Another series of authorities was referred to by learned counsel to support the propositions, among others, that the plaintiff in initiating the present suit together with another non-party to the D2 Arbitration is attempting to circumvent the arbitration agreement and this should not be encouraged; that the duty of the court is to act upon the arbitration agreement; and that there exist special circumstances justifying the court to exercise its discretion to grant the stay application. These authorities are *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32; *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd* [2014] MLJU 1860; [2014] 3 CLJ 915; *Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd & Ors and other appeals* [2015] 1 MLJ 507; [2014] 1 LNS 1175; and *Reichhold Norway ASA and another v Goldman Sachs International (a firm)* [2000] 1 WLR 173.

The plaintiff's submissions

[56] Mr Lam fervently submitted that D1 has failed to meet the threshold requirement ie to identify what are the 'rare and compelling circumstances' warranting a stay of the present action against D1.

[57] D1's contentions with regards to cl 15 of the JVA are said to be misconceived in fact and in law for the same reason as D1's reliance on cl 18.4, namely that D1 is not a party to the JVA and hence D1 is not entitled to rely on cl 15 to stay the court proceedings against it. The plaintiff sought to distinguish the cases cited by D1 on this issue on the ground that these cases do not concern the scenario where reliance is placed on an arbitration agreement by a non-party to the same.

[58] As for the other set of authorities, it was submitted that these do not assist to advance D1's case at all. In order to do justice to the efforts by Mr Lam and his associates in trying to differentiate the cases cited by D1, the gist of their submissions in respect of each case is set out below:

(a) in *Renault SA*, the plaintiffs (Inokom Corp Sdn Bhd and Quasar Carriage Sdn Bhd) issued a writ and SoC claiming damages against the first defendant (Renault SA) for breach of contract, fraudulent misrepresentation and breach of fiduciary duties; and against the first defendant, second defendant (Tan Chong Motor Holdings Berhad) and third defendant (TC Euro Cars Sdn Bhd) for conspiracy to injure and defraud the plaintiffs. Relying on an arbitration agreement contained in the master agreement to govern the co-operation on the import and distribution of Renault built-up vehicles in Malaysia between Renault, Inokom and Quasar, Renault filed an application to stay the court proceedings against it in favour of arbitration. On the other hand, Tan Chong Motor and TC Euro Cars applied to strike out the SoC under O 18 r 19(1) of the RoC 2012. Hence, the dissimilarity between *Renault SA* and the instant case lies in the fact that *the application filed by the non-parties to the arbitration agreement in Renault SA was not an application to stay the court proceedings against them pending the disposal of the arbitration between the parties to the arbitration agreement*. The causes of action against Renault, being a party to the arbitration agreement, and against Tan Chong Motor and TC Euro Cars, who are not parties to the arbitration agreement, are substantially different. In arriving at the decision that both applications should have been allowed by the High Court, the Court of Appeal did not have to consider the danger of multiplicity of proceedings as an issue since the inquiry was focussed on whether there was a cause of action in the tort of conspiracy against Tan Chong Motor and TC Euro Cars;

(b) in *AV Asia*, the plaintiff (AV Asia Sdn Bhd) filed a RM1.3 billion suit against the first defendant (MEASAT Broadcast Network Systems Sdn Bhd) for breach of a mutual non-disclosure agreement ('NDA') between them, and against the second defendant (Tele System Electronic (M) Sdn Bhd) for the tort of inducing a breach of contract. In reliance on an arbitration agreement in the NDA, MEASAT filed an application to stay the court proceedings against it pending reference to arbitration pursuant to s 10 of the AA 2005. *Tele System did not file an application to stay the proceedings against it pending the disposal of the arbitration proceedings between AV Asia and MEASAT*. Furthermore, the causes of action against MEASAT, being a party to the arbitration agreement, and against Tele System, a non-party to the arbitration agreement, are again, substantially different;

(c) in *Dr Dieter Gobbers*, the plaintiffs commenced an action against the defendants premised on an allegation of fraudulent misrepresentation. Relying on the arbitration agreement in the settlement agreement, the first defendant filed an application for stay of the court proceedings for the matter to be referred to arbitration at the International Chamber of Commerce. This application was allowed by the High Court and arbitration proceedings between the plaintiffs and the first defendant were commenced. Subsequently, the second, third and fourth defendants and the fifth defendant respectively filed applications to stay the court proceedings against them pending the outcome of the said arbitration. The Court of Appeal ultimately allowed the applications by these defendants as the court agreed with the High Court that there were special circumstances and the discretion was correctly exercised in granting the stay applications. The Court of Appeal also agreed that concurrent proceedings are generally undesirable as it will cause confusion and injustice, and if the court proceedings are not stayed, there will be the prospect that these defendants will be put to considerable expense and inconvenience of duplicated proceedings.

In contrast, it is D2 that initiated the claim against the plaintiff premised on the plaintiff's alleged failure to discharge its obligation under cl 3.7 of the JVA to subcontract the project to SEJV. *This is not an issue to be determined by the court in the present action. The outcome and/or any findings of fact made in the D2 Arbitration involving D1 will not be binding on and/or affect D1 as D1 is not a party to the JVA and the D2 Arbitration. There is no on-going arbitration proceedings between the plaintiff and D2 relating to the plaintiff's claims against D2 in the present action. D1*, against whom the plaintiff is unable to commence arbitration proceedings, *is the main and crucial defendant in the present action* as it was D1 who first engaged in discussions with the plaintiff on D1 and/or D2's participation in the project. Thus, the court proceedings must proceed and be concluded before any arbitration proceedings;

(d) in *Reichhold Norway*, the defendants had been engaged as agents by a Norwegian company ('seller') to advise in and negotiate the sale of one of the seller's subsidiary companies on terms that the seller would indemnify the defendants against consequent liability. In the course of negotiations, the defendants supplied confidential business information about the subsidiary company to the second plaintiff. Eventually, the share capital of the subsidiary company was transferred to the first plaintiff. The plaintiffs later commenced an action against the defendants claiming damages for negligent misstatement. Relying on the arbitration proceedings between the plaintiffs and the seller which was commenced pursuant to a sale agreement between the plaintiffs and the seller for overpayment of the purchase of the seller's subsidiary, the Commercial Court allowed the defendants' application to stay the court proceedings against them pending the disposal of the said arbitration proceedings. The Commercial Court found that cost, convenience and interest of justice weighed heavily in favour of granting the stay as, inter alia, the plaintiffs' claim against the seller was more straightforward compared to the plaintiffs' claim against the defendants. The Court of Appeal upheld the decision. The reasons given by Mr Lam to distinguish *Reichhold Norway* from the case before this court are basically the same as that for *Dr Dieter Gobbers*'s case.

Determination by the court

[59] I have considered the averments in the affidavits filed by the plaintiff and D1 together with the comprehensive submissions by their counsels and in my opinion, D1 has not established that there are special or rare and compelling circumstances warranting a stay of the present action against itself.

[60] I accept the plaintiff's submission that D1's arguments turning on cl 15 of the JVA is flawed for the same reasons as its attempt to rely on cl 18.4. These two clauses are not applicable to D1 for the simple reason that D1 is not a party to the JVA. D1's contention that the scope of cl 15 can encompass the plaintiff's claim of negligent misrepresentation and/or misstatement made by D1 is far-fetched and has no solid foundation.

[61] In addition, the court is not convinced that a decision should be made in favor of D1 premised on *Renault SA* and the other cases which were cited in this category since the plaintiff has successfully distinguished the facts in these authorities from the factual matrix of the case that is now before this court. In the final analysis, applications of this nature are fact sensitive and the factors to be weighed in granting a stay of the court proceedings pending the disposal of the arbitration proceedings or otherwise really turns on the peculiar facts in each case.

[62] It is my considered view that there are persuasive reasons for the action against D1 to proceed and be disposed first as outlined in the part of this judgment pertaining to D2's application in encl 7, as opposed to being stayed to make way for the D2 Arbitration to be completed and determined by the arbitrator.

CONCLUSION

[63] Based on all the abovesaid considerations, D2's application in encl 7 was thus allowed, subject to the said condition, and D1's application in encl 8 was dismissed with costs in the cause for both applications.

Order accordingly.

Reported by Ashok Kumar